This tax basis also is unfair. In its comments before the Joint Board, AirTouch also showed that basing universal service contributions on net revenues can result in *greater tax burdens on subscribers in some higher-cost areas.*[63]

A third major drawback of this approach is that it relies on traffic-sensitive charges to collect contribution. Because these charges are traffic sensitive, they can be expected to distort end-user calling decisions, thus reducing the benefits generated by the public switched telephone network.[64] This is, of course, the source of the billions of dollars of annual deadweight losses projected in these reply comments and AirTouch's earlier comments.

Lastly, depending on how end users are informed about intermediate tax payments (*i.e.*, taxes on intercarrier services), this approach may or may not satisfy the principle of accountability.

2. A Tax on Retail Revenues. While this tax basis may fare better than a tax on net revenues in terms of accountability, it suffers from all of the other defects of a tax on net revenues.

3. A Tax on Minutes of Use. A net revenue or retail revenue basis lacks competitive and technological neutrality. This problem can be corrected by using traffic minutes as the tax basis. Clearly, if a uniform per-minute surcharge were placed on all telecommunications traffic, it would not have the problems identified above for net or retail revenues. Moreover, it would also lead to each service bearing a relatively small burden, rather than some services taking on a disproportionately large burden. Further, in

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63 *Id.* at 15.

64 *See* Comments of GTE at 33.

contrast to a revenue basis, a per-minute basis would not collect the least contribution from consumers with the lowest cost of service.

Like revenues, however, the use of traffic to assesses contribution burdens results in a system of traffic-sensitive charges. Hence, as with the use of a revenue basis, a per-minute basis will distort telecommunications consumption decisions and give rise to significant deadweight losses. Further, such an approach would be difficult to administer because local exchange carriers do not have data regarding the per-minute use of their networks[65] — as a rule, LECs bill on a fixed basis.

D. Summary of Recommended Approach.

In summary, the Commission should levy a flat surcharge to raise contribution from non-targeted groups. Failing adoption of this policy, AirTouch urges the Commission to consider a uniform per-minute surcharge on all retail telecommunications services.[66] While, this approach has numerous problems, it is less inequitable and discriminatory than a tax on revenues. As a transition measure, the Commission may want to combine approaches by increasing the flat charge on end users but retaining some per-minute mark up.

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[65] Although the technology exists to develop such data, it is not currently deployed.

[66] Alternatively, the Commission could levy such a surcharge on all services and allow netting out along the lines proposed for net revenues.

V. UNIVERSAL SERVICE CONTRIBUTION OBLIGATIONS SHOULD REFLECT A CARRIER'S ELIGIBILITY TO RECEIVE SUPPORT

AirTouch agrees with the Arch Communications Group, Inc. ("Arch"), Paging Network, Inc. ("PageNet"), and the Paging and Narrowband PCS Alliance of PCIA ("PCIA - Paging and Narrowband Alliance") that, as applied to paging and other messaging services, the contribution mechanism recommended by the Joint Board is inconsistent with the statutory mandate that universal service funding mechanisms must be equitable and nondiscriminatory.[67] As demonstrated by the commenters, however, requiring messaging to contribute to the universal service fund on an equal basis with other telecommunications carriers is not "equitable and nondiscriminatory." Messaging services would not be eligible to receive universal service support under the Joint Board's proposal because the services cannot offer voice-grade access to the PSTN and other elements contemplated under the definition of universal service.[68] As a result, the proposed universal service funding mechanism will place messaging services at a competitive disadvantage by forcing them to contribute at the same level to a fund which will benefit competing services to a far greater degree that it benefits them.[69] Consistent with these comments, therefore, AirTouch submits that to be equitable and nondiscriminatory universal service contribution obligations should reflect a carrier's eligibility to receive support.

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67 47 U.S.C. §§ 254(b)(4) & (d); *see also* Comments of Arch at 3-6; Comments of PageNet at 11-12; Comments of PCIA - Paging and Narrowband Alliance at 3-6.

68 *See* Comments of PageNet at 11; Comments of Arch at 4.

69 Comments of PageNet at 12; *see also* Comments of Arch at 4-5.

To that end, should the Commission adopt the fixed surcharge on access lines proposed herein, AirTouch submits that the Commission should exempt paging carriers from this surcharge. By virtue of its one-way nature, paging does not have access lines and therefore would be exempt from such a surcharge by definition. Further, exempting paging carriers from the surcharge would be consistent with the principles of fairness and economic efficiency discussed above.

As the Commission is aware, the industry average revenue per unit per month is approximately $10,[70] and this average revenue is decreasing by approximately 6 percent per year. Consequently, even a moderate surcharge would magnify the rate — *e.g.*, a $1 surcharge would be approximately a 10 percent assessment for paging customers, whereas for wireline customers it might be a 2 percent assessment. Thus, imposition of a surcharge upon paging carriers would be inefficient. Furthermore, paging customers are even more price sensitive than other CMRS customers and their monthly bills are 1/6 to 1/8 those of other CMRS carriers. In addition, paging carriers will be unable to receive universal service support and therefore, as demonstrated by Arch and PageNet,[71] imposition of a surcharge will place paging carriers at a competitive disadvantage as to other services that will benefit from universal service support. As a consequence, simple

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70 *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, MD Docket No. 95-3, *Report and Order*, 10 FCC Rcd. 13512 (1995). The Commission also found that the paging industry "has low profit margins compared to the cellular industry and to other public mobile services." *Id.* at 13544. For this reason, the Commission established a separate and lower fee category for paging licensees, explaining that the reduced fees were intended to "provide an equitable cost allocation among cellular and other public mobile licensees and paging licensees based upon their relative market pricing structures while minimizing any adverse impact on the one-way paging industry." *Id.*

71 Comments of PageNet at 12; *see also* Comments of Arch at 4-5.

fairness dictates that paging carriers should not be required to bear the proposed surcharge.

VI. THE COMMISSION SHOULD NOT EXTEND UNIVERSAL SERVICE SUPPORT TO SERVICES, SUCH AS INSIDE CONNECTIONS FOR SCHOOLS AND LIBRARIES, FOR WHICH THE COSTS EXCEED THE BENEFITS AND FOR WHICH THERE IS NO STATUTORY MANDATE

AirTouch has argued that the costs of the universal service programs proposed in the *RD* are inappropriately great and will generate significant costs without generating significant benefits. Indeed, as discussed above, AirTouch believes that the tax burdens placed upon telecommunications carriers and subscribers to fund the programs will give rise to enormous efficiency losses, and will likely harm many of the consumers that the universal service programs are intended to benefit. Accordingly, AirTouch urges the Commission to ensure that the universal service programs are efficiently designed and are no larger than absolutely necessary to achieve the goals of the 1996 Act. To that end, AirTouch offers the following discussion outlining steps that the Commission should take to reduce the size of the universal service fund and the resulting harm to telecommunications carriers.

A. Subsidizing Inside Connections for Schools and Libraries is Contrary to the Requirements of the 1996 Act and will Trigger Taxes that Lower Consumer Welfare.

AirTouch has previously demonstrated that neither the language nor the legislative history of Section 254(h) support the conclusion that Congress intended that internal connections should be eligible for universal service support.[72] As Commissioner Chong has aptly noted, it is well-established under Commission precedent that "there is a difference between (1) the telecommunications and information services repeatedly referenced in the statute, and (2) telecommunications facilities, such as [inside wiring and CPE]."[73] Moreover, Section 254(c) expressly limits universal service support to "telecommunications services," and Sections 254(c)(3) and 254(h) similarly restrict educational providers' and libraries' eligibility for discounts for "services."[74] Consequently, AirTouch objects to the *RD*'s recommendation that inside connections be made eligible for universal service support.[75]

A review of the recently filed comments demonstrates a split of opinion among the parties to this proceeding regarding whether inside connections should be eligible for universal service support. Approximately twenty-one commenters, the majority of whom are telecommunications carriers,[76] object to subsidizing inside wiring and connections.

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72 Further Comments of AirTouch at 9-12; Comments of AirTouch on *RD* at 18-21.

73 *See* Chong Separate Statement 6 (*citing NARUC v. FCC*, 880 F.2d 455, 425 (D.C. Cir. 1989)).

74 47 U.S.C. §§ 254(c), (h); *see also* Chong Separate Statement at 6-7. AirTouch also notes that the Joint Board itself referred to "telecommunications services" and "internal connections" separately. *RD* ¶ 629 ("[W]e recommend that the Commission use section 254(h) to provide universal service support to schools and libraries for *telecommunications services*, Internet access, *and internal connections*."(emphasis added)).

75 *RD* at ¶ 473.

76 Interestingly, AirTouch notes that the California Department of Consumer Affairs, Illinois Commerce Commission, and the New York State Education Department were among those commenters objecting to the *RD's* proposal to fund inside connections.

These commenters all agree that Section 254 does not contemplate funding inside connections and such subsidies would be economically unreasonable and cause significant economic distortions.[77] Furthermore, funding of inside connections would not be technologically or competitively neutral.[78] On the other hand, approximately nine commenters, primarily state utility commissions and public interest groups, endorse the proposal to fund inside wiring, presumably because they have an incentive to make the universal service subsidies as broad as possible since they receive the benefits of universal service subsidies without incurring funding obligations.[79]

For the reasons set forth by AirTouch and the numerous other commenters cited above, reading the term "access" broadly in order to justify funding interior connections

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77 *See, e.g.*, Comments of Ameritech at 18-19; Comments of the Association for Local Telecommunications Services at 16-18; Comments of AT&T; Comments of BellSouth at 26; Comments of GTE Service Corporation at 89-96; Comments of MFS Communications Co., Inc. at 30-33; Comments of NYNEX, Inc. at 40; Comments of PCIA at 19-23; Comments of USTA at 34.

78 As GTE noted in its comments, the *RD* a broad definition of inside connections that includes deregulated CPE. Comments of GTE at 94. However, the providers of such deregulated equipment may well not be eligible for universal service support. *Id.* Consequently, LECs and other carriers that participate or may participate in that market will have a substantial competitive advantage because they are eligible to receive universal service support. *Id.*

79 *See, e.g.*, Comments of Alliance for Public Technology at 17; Comments of the Commonwealth of the Northern Mariana Islands at 35-36; Comments of the Education and Library Networks Coalition at 3-4; Joint Comments of People for the American Way, *et al.* at 10; Comments of the Public Utilities Commission of Ohio at 17; Comments of Tele-Communications, Inc. at 8-9. AirTouch notes, however, certain PUCs and public interest groups recognize that funding for inside connections will reduce the affordability of basic services to consumers, and challenged the Commission's jurisdiction to tax deregulated areas. *See, e.g.*, Comments of California Department of Consumer Affairs at 24-31; Illinois Public Service Commission at 8.

is contrary to the terms of the 1996 Act and is in effect a "slippery slope"[80] that will provide no fundamental standard to judge what equipment or services should or should not be supported. This difficulty can be easily demonstrated with reference to the suggestion in the *RD* that personal computers be excluded from eligibility for universal service support, but servers will constitute inside connections.[81] There are extensive substitution possibilities between clients and servers, ranging from smart servers with "dumb" client terminals to peer-to-peer networks with no dedicated services. The *RD's* proposal to fund inside connections provides no workable standard by which to judge at which point any of these configurations are 'servers' eligible for funding and which are personal computers and therefore ineligible for funding as inside connections. In short, the proposal to fund inside wiring is contrary to the terms of the 1996 Act and is likely both to be administratively unworkable and to distort investment decisions in capital equipment such as area networks. This proposal is also flatly inconsistent with the need to cap the universal service fund at a reasonable level, as supported by a broad range of commenters.[82]

B. Subsidies for Schools and Libraries Should be Capped at a Lower Level.

AirTouch supports NYNEX's recommendation of cap of $1.5 billion annually for schools and libraries, with the policy goal of achieving the McKinsey full classroom

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80 Chong Separate Statement at 7.

81 *RD* at ¶ 477.

82 Comments of AT&T at 21; Comments of Time Warner Communications Holdings, Inc. at 28; Comments of Illinois Public Service Commission at 6; Comments of Bell Atlantic at 21.

model by the year 2005.[83] There is substantial record support for some form of cap upon the universal service fund.[84] Further, the schedule is more realistic and would place fewer burdens on telecommunications providers during this critical time in the evolution of competition. Moreover, a slower roll out will give schools more time to prepare for the fundamental changes and concomitant investments in equipment and training needed to make full use of modern telecommunications technology in the classroom.

LCI International, Inc. recommends that the discount to eligible schools and libraries for advanced telecommunications services be no more than 20 percent.[85] AirTouch also supports this recommendation for purposes of contributions from the universal service fund. It is a sound way to ensure that the broadest number of schools and libraries benefit, and thus the largest number of children benefit, from this support program. However, this cap should not limit carriers from exercising their business judgement to offer higher discounts voluntarily for charitable or other business purposes.

C. There is no Sound Public Interest Rationale for Subsidizing Single-line Business Customers

The Joint Board recommends making universal service support available for designated telecommunications services carried to single-connection businesses in high cost areas.[86] However, no empirical evidence is provided in the *RD* to support the claim

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83 NYNEX Comments at 39.

84 *See, e.g.*, Comments of AT&T at 2; Comments of Time Warner at 31; Comments of Illinois PSC at 6; Comments of Bell Atlantic at 21; Comments of Ad Hoc TUC at 29-32; Comments of Citizens Utilities Co. at 3, 16-17.

85 Comments of LCI International, Inc. at 10.

86 *RD* at ¶ 91.

that single line business owners would find unsubsidized costs prohibitive, and there is little reason to believe that they would. As AirTouch and other commenters pointed out, business users, unlike residential users, can deduct the costs of telecommunications services from their income taxes, reducing the net cost of these services, and/or increase their rates to cover the increased costs.[87]

D. The Commission Should Limit Subsidies in Support of Services Provided to Rural Health Care Providers.

The Commission should not use universal service subsidies for rural health care providers to fund the build out or upgrading of rural networks. Both ILECs and CLECs agree that such subsidies would not be competitively neutral.[88] Such a policy would distort the market outcome in ways that do not promote the public interest.[89] This policy could also dramatically increase the cost of program and the resulting welfare losses suffered by consumers taxed to pay for the subsidies.[90] Moreover, there is no public interest rationale for requiring carriers to build out facilities to support rural telemedicine.[91]

Several other important points were raised in the comments on subsidies to rural health care providers. In particular, the Commission should be clear that telephone

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87 *See, e.g.,* Comments of AirTouch at 22; Comments of LCI International, Inc. at 6; Comments of Sprint at 14; Comments of Ameritech at 4-7; Comments of ALTS at 5-6; Comments of Cox Communications, Inc. at 3-4.

88 *See, e.g.,* Comments of Ameritech at 27; Comments of The National Cable Television Association, Inc. at 23-24.

89 Comments of BellSouth at 40-42, 44-46; Comments of SBC at 10-11.

90 Comments of Pacific Telesis Group ("PacTel") at 54-56.

91 Comments of PacTel at 58-59.

services provided to patients in their rooms are not eligible for rural health care subsidies.[92] The Commission should also be clear that *rates* — and not *total bills* — are what should be comparable between rural and urban areas.[93]

VII. STATE AND FEDERAL UNIVERSAL SERVICE POLICIES MUST AVOID DUPLICATION AND INCONSISTENCY

A. The Commission Must Take the Lead in Implementing a Unified and Rational National Universal Service Policy

The need for coordination between federal and state universal service support mechanisms is amply demonstrated by the comments to this proceeding.[94] Indeed, such coordination is mandated by Section 254(f) which specifically constrains the states' authority in this area. In short, a state may adopt universal service regulations *only* if such regulations are "not inconsistent with the Commission's rules to preserve and advance universal service" and such state regulation cannot "rely on or burden *Federal* universal support mechanisms."[95] Therefore, AirTouch submits that the Commission must take the lead and implement a unified and rational universal service policy that coordinates interstate and intrastate universal service mechanisms.

AirTouch believes that there are two primary areas in which coordination is needed: (1) taxes; and (2) rate rebalancing. With respect to taxes, the Commission

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[92] Comments of Ameritech at 25.

[93] Comments of Ameritech at 25-26; Comments of PacTel at 56.

[94] *See* Comments of AirTouch at 27-30; Comments of USTA at 17; Comments of Ohio PSC at 25.

[95] 47 U.S.C. § 254(f).

should ensure that taxes levied on telecommunications service consumers and providers to fund state universal service programs do not distort competition, are not unreasonable, and are nondiscriminatory. With respect to rate rebalancing, the Commission must work with the states to ensure that intrastate rates are adjusted to reflect the funds LECs receive through the new explicit subsidy mechanisms.

To that end, AirTouch urges the Commission to set guidelines to limit states to setting fair, reasonable, and non-discriminatory taxes. Without such federal guidelines and coordination, wireless carriers, such as AirTouch, will be exposed to discriminatory and inefficient state universal service taxes.[96] Moreover, such coordination is mandated by the limitation placed upon state universal service authority in Section 254(f).[97]

While the Commission may lack the authority to set state tax levels or adjust intrastate rates in response to federal payments, it can condition receipt of those payments on compliance with Commission tax and rate guidelines. Under such a system, the Commission would declare carriers (and possibly subscribers) in a given state to be ineligible for federal universal service support funds if the state's programs violated

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96 The degree of exposure for the wireless industry is demonstrated in the recent order of the State Corporation Commission of the State of Kansas, *A General Investigation into Competition within the Telecommunications Industry in the State of Kansas*, Docket No. 190,492-U, 94-GIMT-478-GIT, *Order* (issued Dec. 27, 1996). Therein, the Corporation Commission imposed an assessment of approximately 14 percent upon all intrastate telecommunications revenues. Further, such assessment is discriminatory as between CMRS and interexchange carriers ("IXCs") because while both carriers' revenues will be assessed to the same extent, the IXCs will realize a benefit (a 30 percent reduction in access charges) not realized by wireless carriers. *See Order slip op.* at 70.

97 47 U.S.C. § 254(f).

Commission guidelines.[98] States that did not want to comply with these guidelines would be free to opt out of the system. States would not, however, be free to opt out of having their telecommunications services subscribers and providers make contributions to support federal universal service programs. If they could, low-cost states would likely pull out, leaving only high-cost states to subsidize one another.

An approach similar to that outlined above already has been used by the Commission in the case of the Lifeline program, where federal support payments are contingent on the nature of state programs, and this approach is consistent with the one used in the administration of the Federal Highway Trust Fund.

B. CMRS Providers are Subject Solely to Federal Universal Support Obligations.

Again, AirTouch submits that coordination by the Commission is necessary to ensure that its universal service mechanisms are equitable, nondiscriminatory, and competitively neutral for all carriers, not just wireless carriers. As AirTouch demonstrated previously, CMRS is inherently and jurisdictionally an interstate service and is subject only to federal universal service requirements and funding obligations.[99] CMRS is not currently a land-line service substitute for a substantial portion of the communications in any states and therefore Section 332(c)(3) of the Act prohibits states from imposing universal service requirements on CMRS

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[98] In the previous round of comments, AirTouch proposed an offset mechanism that would reduce federal payments as state tax rates increased. Comments of AirTouch on *RD* at 30. AirTouch now believes that the broader approach suggested here would be more effective and less subject to gaming.

[99] *See* Comments of AirTouch at 2-5; Reply Comments of AirTouch at 18-19; Comments of AirTouch on *RD* at 30-34.

providers.[100] Moreover, this conclusion is fully consistent with the 1996 Act which expressly preserved the important policy placing regulation of the CMRS industry, including regulation for universal service purposes, in the hands of the FCC unless and until CMRS becomes a land line service substitute for a substantial portion of the communications in any state as set forth in Section 332(c)(3).

The record in this proceeding fully supports AirTouch's interpretation of Sections 332(c)(3) and the 1996 Act. All of the parties addressing this issue in comments on the *RD* agreed that Section 332(c)(3) preempted state authority to impose universal service obligations upon CMRS providers unless CMRS is a land line substitute for a substantial portion of the communications in any state.[101] Moreover, while the *RD* concludes that Section 332(c)(3) does not exempt CMRS providers from state universal service obligations, the *RD* does so without providing any analysis.[102] Indeed, the *RD* fails even to recognize, let alone rebut, the plain language of Section 332(c)(3) and the arguments raised by AirTouch and other commenters as to why Section 332(c)(3) bars states from imposing universal service obligations upon CMRS providers. As such, the *RD* is

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[100] 47 U.S.C. § 332(c)(3). Some services, such as paging, can never be effective land line substitutes.

[101] *See* Comments of American Personal Communications at 10; Comments of Bell Atlantic NYNEX Mobile, Inc. at 5; Comments of CTIA at 13; Comments of CelPage, Inc. at 6; Comments of Nextel at 3-5; Comments of Paging Network, Inc. at 5-10; Comments of PageMart, Inc. at 2; and Comments of PCIA at 31-33.

[102] *RD* at ¶ 791. The Public Utilities Commission of the State of California supports this conclusion without providing any substantive analysis. Comments of the People of the State of California and the Public Utilities Commission of the State of California at 15.

inherently arbitrary and capricious and is not reasoned decision making on this point and therefore cannot be relied upon by the Commission.

Given the *RD*'s silence on this issue, AirTouch is forced to assume that the *RD*'s determination is based upon the belief that the language of Section 254(f) providing that "[e]very telecommunications carrier that providers intrastate telecommunications service shall contribute . . . to the preservation and advancement of universal service in that State" implicitly repeals the limitation upon state universal service jurisdiction over CMRS set forth in Section 332(c)(3). This argument is wholly without merit. It is a cardinal rule of statutory construction that where a provision is explicit on a particular issue that is also addressed by a later enacted but more general provision, the explicit language is controlling.[103] The applicability of this rule was reconfirmed in Section 601(c)(1) of the 1996 Act which states that the 1996 Act "shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided" in the Act.[104] Section 253(e) provides further evidence that Congress did not intend the 1996 Act to repeal Section 332(c)(3) by stating that "[n]othing in this section shall affect the application of 332(c)(3) to commercial mobile providers."[105] Thus, the conclusion

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[103] *See* Comments of Bell Atlantic NYNEX Mobile, Inc. at 9, *citing Simpson v. United States*, 435 U.S. 6, 15 (1978); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

[104] Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (1996).

[105] 47 U.S.C. § 253(e).

that Section 254(f) implicitly repeals Section 332(c)(3) flies in the face of longstanding principles of statutory construction and the express language of the 1996 Act.[106]

VIII. CONCLUSION

In total, the comments demonstrate the fundamental point made by AirTouch in its comments. While the Joint Board has made a significant contribution to the policy

106 AirTouch notes that, without addressing the impact of the 1996 Act, a recent decision of the Superior Court of Connecticut, Judicial District of Hartford-New Britain at Hartford, held that "the Budget Act preempts" the Connecticut Department of Public Utility Control from assessing CMRS providers "for payments to the Universal Service and Lifeline Programs." *Metro Mobile CTS of Fairfield County, Inc., etc. v. Conn. Dep. of Public Utility Control*, __ Conn. Super. Ct. __, *slip op.* 7-8 (December 9, 1996).

discussion, key aspects of the *RD* are fundamentally unsound and should not be adopted by the Commission.

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January 10, 1997

CERTIFICATE OF SERVICE

I, Shelia L. Smith, do hereby certify that copies of the foregoing "Reply Comments of AirTouch Communications, Inc. on Federal-State Joint Board Recommended Decision" were served this 10th day of January, 1997 by first class United States mail, postage prepaid to the following:

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